Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term 1996

BARBARA GUNERATNE,

*Petitioner,*

-against-

ST. MARY'S HOSPITAL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Is a policy which requires all persons to have documentation of 100% recovery, no limitations, before returning to work a violation of the Americans with Disabilities Act?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Fifth Circuit are:

1) Barbara Guneratne, Plaintiff and Appellant below and Petitioner for certiorari before this Honorable Court;

2) St. Mary's Hospital, Defendant and Appellee below and Respondent before this Honorable Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

BASIS FOR JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 7

CONCLUSION ..... 18

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page(s)

CASES

*AKA v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997) ..... 13

*Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342 (D.Ariz. 1992) ..... 16

*Beck v. University of Wisconsin-Milwaukee*, 75 F.3d 1130 (7th Cir. 1996) ..... 12

*Bombrys v. City of Toledo*, 849 F.Supp. 1210 (N.D. Ohio 1993) ..... 17

*Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) ..... 11, 14

*Cleveland Board of Education, et al. v. LaFleur, et al.*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ... 8, 9

*Coleman v. Zatechka*, 824 F.Supp. 1360 (D.Neb. 1993) ..... 16

*EEOC v. Chrysler Corp.*, 917 F.Supp. 1164 (E.D. Mich. 1996) ..... 17

*Forman v. Babcock & Wilcox Comp.*, No. 96-60510 (5th Cir. July 10, 1997) ..... 10

*Galloway v. Superior Court of Dist. Of Columbia*, 816 F.Supp. 12 (D.C. 1993) ..... 16

*Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*Hammer v. Bd. of Education of Arlington Heights School Dist., No. 25*, 955 F.Supp. 921 (N.D. Ill. 1997) ..... 14

*Hutchinson v. United Parcel Svc., Inc.*, 883 F.Supp. 379 (N.D.Iowa 1995) ..... 16, 18

*Lucero v. Hart*, 915 F.2d 1367 (9th Cir. 1990) ..... 11

*Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1980) ..... 14

*School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) .... 10

*Shelton v. Tucker*, 364 U.S. 479, 80 S.Ct. 247, 5 L.Ed.2d 231 (1960) ..... 8

*Stillwell v. Kansas City, Mo., Bd. of Police Comm'rs*, 872 F.Supp. 682 (W.D.Mo. 1995) ..... 16, 17

*Tyndall v. National Ed. Centers, Inc. of California*, 31 F.3d 209 (4th Cir. 1994) ..... 10

*Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1994) ..... 12

*Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) ..... 9

UNITED STATES STATUTES

28 U.S.C. § 1254(1) ..... 1

29 U.S.C. § 794 ..... 1

42 U.S.C. § 12101 ..... 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12102(2) ..... 9
42 U.S.C. § 12111(3) ..... 15
42 U.S.C. § 12111(8) ..... 10
42 U.S.C. § 12111(9) ..... 12
42 U.S.C. § 12112(a) ..... 9
42 U.S.C. § 12112(b)(5)(A) ..... 10, 12
42 U.S.C. § 12113 ..... 15
42 U.S.C. § 12131-12165 ..... 16

OTHER AUTHORITIES

28 C.F.R. Pt. 35 App. ..... 16
29 C.F.R. Pt. 1630, App. ..... 9, 13
29 C.F.R. § 1630.2(o)(3) ..... 13
29 C.F.R. § 1630.2(r) ..... 15
45 C.F.R. § 84.3(k) ..... 10

## PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on June 18, 1997.

## OPINIONS BELOW

The opinion of the District Court was published at 943 F.Supp. 771 (S.D.Tex.1996) (App. pp. 3-13). The opinion of the court of appeals was not published (App. p. 1-2).

## BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on June 18, 1997. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101:

The Americans with Disabilities Act of 1990 which is attached within the appendix of this petition.

29 U.S.C. § 794

Section 504 of the Rehabilitation Act of 1973:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

## STATEMENT OF THE CASE

Barbara Guneratne, a registered nurse, originally became an employee of St. Mary's Hospital on April 3, 1989, serving in several different positions throughout her tenure. On August 15, 1993, while on duty as a relief nurse, Guneratne was injured when she attempted to help a patient who had fallen.

Guneratne sought medical treatment and evaluation of the injury to the lumbosacral region of her back. She was ultimately referred to Dr. Ponder for an independent evaluation for her workers compensation claim. Dr. Ponder determined that Guneratne could return to work. According to Dr. Ponder's report, she had reached Maximum Medical Improvement and had sustained a permanent impairment rating of 7% which necessitated that upon her return to work, she had to be aware of the vulnerability present in her lumbar spine.

When Guneratne attempted to return to work, she was faced with a discriminatory barrier *erected by St.*

*Mary's Hospital policy of requiring 100% recovery before allowing an employee to return to work,* to-wit:

> Employees having been off five days or more due to illness, injury, or medical reasons are required to present a physician's release to return to work without restrictions, to the employee health nurse or designee prior to returning to work.

Guneratne submitted a Physician's release for return to work with restrictions which was a request for accommodation of specified physical limitations, to-wit: June 8, 1994 Work Notice required no lifting or bending greater than five (5) pounds and wearing a lumbar support while working and July 27, 1994 Work Notice required no heavy lifting and wearing a lumbar support.

Guneratne was initially informed on June 14, 1994, by Ms. Lowe, an Employee Health Nurse, that "St. Mary's does not have a light duty program and therefore she would need a note from the Doctor without restrictions." On August 9, 1994, Employee Health Nurse, McGarry, made an entry in the Employee Health Nurse log stating that she "met with J. Fitch & Ms. Pickney. She [Ms. Pickney] will write a letter to Barbara informing job qualifications & necessity of being totally without restrictions before she can be on active relief nurse duty."

There was an assertion by St. Mary's Hospital that on August 9, 1994, J. Fitch, Ms. Pickney and Nurse McGarry, evaluated Guneratne's ability to perform the essential functions of her job by assessing her work release and the physical requirements for her position. There was no documentation of the evaluation, and there is no testimony or documentation by St. Mary's that "reasonable

accommodations" were considered. In fact, St. Mary's Hospital asserted in its appellate brief that St. Mary's considered the physical requirements for the position, determined that because Guneratne was restricted from lifting heavy items that she could not meet the essential function of her position and, therefore, was not able to return to work at that time. There is no pretense presented by St. Mary's that they considered reasonable accommodations. They further state that "[c]learly, St. Mary's does not require a '100% recovery'; it requires that an employee be capable of performing the essential functions of her position." St. Mary's supported this position with the testimony of Mendez stating that "if [Guneratne] had a full release of her job duties . . . she could have returned to work."

In her letter dated September 1, 1994, Ms. Pickney set out the physical requirements for the clinical nurse position, then proceeded to inform Guneratne that St. Mary's has a policy of no light duty and reiterated that she must have a full release to return to work. No mention was made of St. Mary's ADA policy or any type of accommodation evaluation.

Even though St. Mary's argues below that they had in place a detailed ADA policy, there is a blatant absence of any record of this policy being utilized to evaluate and document Guneratne's request to return to work with physical limitations. There is no record of an ADA accommodation request form completed, nor any suggestion that Guneratne could be evaluated for such an accommodation. Nor was the undue hardship form completed indicating that St. Mary's had evaluated the accommodation request and determined that it created an undue

hardship for St. Mary's. Nonetheless, the district court determined that there was no accommodation that St. Mary's Hospital could have made that would enable [Guneratne] to perform [essential function of the job]." Guneratne was never evaluated because of the 100% recovery unrestricted release policy. It was stated repeatedly that Guneratne must have a 100% restriction free work release, that there was no light duty program at St. Mary's. In fact, Theresa Mendez, a Coordinator of Human Resources, stated that St. Mary's Hospital has a strict **policy of not allowing any employee who has an injury or disability to return to work unless there has been a 100% release**. During the deposition of Maria Theresa Mendez, she stated that it was her job as manager of Human Resources to enforce the policy of not allowing an employee to return to work unless there was a full release. Ms. Mendez stated that in her role as manager of Human Resources, she saw nothing wrong with such a policy.

When Guneratne's counsel asked Ms. Mendez what an employee could do if they disagreed with the requirements that a person have a full release without restrictions she answered, "We have to abide by the requirement. I don't think that there is anything they can do."

By way of example, the policy of absolutism is revealed in a letter written by Joycie Pickney to Guneratne on September 1, 1994, although the physical requirements of the job are detailed, in the last paragraph she stated that St. Mary's has a policy that there is no light duty and Guneratne must have a full release to

return to work. The statement of the physical requirements clearly was not an evaluation to determine if Guneratne was able to perform the essential functions of the job with or without accommodations.

When Guneratne submitted her work release forms, she was told unequivocally that she must have a 100% release, thus Plaintiff could not get past the barrier erected which prevented her from obtaining an appropriate accommodation. The assertion by St. Mary's Hospital in its appellate brief that Guneratne never formally requested an accommodation is revealing. Guneratne was told repeatedly that she needed a 100% recovery release to return to work. Subsequently, St. Mary's blames Guneratne for not initiating a request for reasonable accommodation which would trigger the employer's obligation to participate in the interactive process of determining reasonable accommodation. In its appellate brief, St. Mary's further states that in her deposition Guneratne stated that she should have been allowed to avoid heavy lifting and/or permitted to "request assistance" in situations where heavy lifting was required. The first time St. Mary's discusses the issue of reasonable accommodation was when its defense counsel was deposing Guneratne pursuant to her filing a claim of discrimination in violation of the ADA. St. Mary's policy of requiring a 100% release establishing full recovery foreclosed access to assessment for reasonable accommodations after submission of the work release indicating a need for accommodation. Whether such a policy is by definition a violation of the ADA is now before this Court.

The district court granted St. Mary's Hospital's Motion for Summary Judgment stating that Guneratne

failed to establish a prima facie case and denied Guneratne's Motion for Summary Judgment. (App. p. 10). The Court of Appeals affirmed without comment. (App. p. 1).

Guneratne was denied further employment with St. Mary's Hospital because she had a permanent physical impairment. James Fitch, Director of Human Resources, stated that St. Mary's Hospital determined that Guneratne could not perform the essential job functions. What is blatantly absent from their evaluation was reasonable accommodation consideration. St. Mary's policy prevented Guneratne from seeking reasonable accommodation.

## REASONS FOR GRANTING THE WRIT

1. A policy requiring all employees to have documentation of 100% recovery, no limitations, before returning to work is an insurmountable barrier for those seeking reasonable accommodation created by the employer. The issue before this Court is whether such a policy is in violation of the Americans with Disabilities Act. This presents a matter of first impression to this Court of vital importance. There is no clear precedent in the lower courts. The viability of the Americans with Disabilities Act of 1990 is at stake in that the employer's use of such a policy renders the reasonable accommodation requirement meaningless. Disabled employees finds themselves in a shell game with their employer. They never know which shell to uncover to pursue reasonable accommodations. If the employee looks to the company's ADA

policy, that shell is empty because the employee has a permanent disability, and the policy of 100% recovery foreclosed pursuit of reasonable accommodation via the company ADA policy. When the employee looks to the district and appellate courts to enforce the protection afforded those with disabilities under the Americans with Disabilities Act, that shell is empty because the employee bears the burden of proving she is qualified to perform the essential functions of the job with or without accommodation. By definition, an employee subject to the 100% recovery policy would always fail to carry this burden because he or she would be unable to ascertain what accommodations would be possible, viable and of course reasonable. Clearly, the employee now looks to this Court to determine the issue of whether a 100% recovery policy is a violation of the Americans with Disabilities Act in that it forecloses reasonable accommodation evaluation.

In the area of constitutionally protected rights, this Court has expressed its disdain for policies which do not take individual assessments into consideration. In *Cleveland Board of Education, et al. v. LaFleur, et al.*, 414 U.S. 632, 644, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), this Court examined the provisions of two school boards' policies requiring pregnant teachers quit working five (5) months prior to the birth of the child and not to return until after the child was three (3) months old. "[T]he question is whether the rules sweep too broadly. *See Shelton v. Tucker*, 364 U.S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable

of continuing. There is no individualized determination by the teacher's doctor – or the school board's – as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. *Cleveland*, 414 U.S. at 644. "[I]n *Vlandis v. Kline*, 412 U.S. 441, 446, [this Court held] 'permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.' " *Id.*

The Americans with Disabilities Act was designed to provide protection against such discriminatory policies. [It] is a federal anti-discrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without disabilities. 29 C.F.R. Pt. 1630, App. (1996). (7). The ADA expansively prohibits discrimination in employment against people with disabilities, providing that, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "disability" includes a physical or mental impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(2). "Discrimination" includes "not making reasonable

accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless operation of the business of such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer. . . . " 42 U.S.C. § 12112(b)(5)(A) *Forman v. Babcock & Wilcox Comp.*, No. 96-60510 (5th Cir. July 10, 1997).

This Court's analysis of otherwise qualified individual found in footnote 17 of *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) similarly defines otherwise qualified in the employment context as "one who can perform 'the essential functions' of the job in question. 45 C.F.R. § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. *Ibid.*" *Arline*, 107 S.Ct. at FN17.

In the case at bar, the district court held that "[Guneratne] cannot establish a prima facie case of discrimination under the ADA because she cannot show that she is a 'qualified individual.' (App. p. 7-8)

"A 'qualified individual' is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8)." *Tyndall v. National Ed. Centers, Inc. of California*, 31 F.3d 209, 213 (4th Cir. 1994). To determine whether a person is qualified for the position held or sought, the court must decide "(1) whether she could 'perform the

essential functions of the job, i.e., function that bears more than a marginal relationship to the job at issue,' and (2) if not, whether 'any reasonable accommodation by the employer would enable [her] to perform those functions.' " *Citing Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993) *Id.* "[The] Plaintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation. *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) *Id.*

The district court, in its evaluation of the summary judgment evidence provided in the case at bar, determined that Guneratne was unable to perform the essential functions of the job. (App. p. 7) The district court went on to evaluate whether any reasonable accommodation by the employer would enable the Plaintiff to perform those essential functions. *Citing, Chandler*, 2 F.3d at 1393-94. (App. pp. 7-8)

There is a crucial difference in the district court's evaluation of essential functions in comparison to its evaluation of reasonable accommodation in that there was no evidence to evaluate the reasonable accommodation analysis. The court discussed the comments made by Guneratne during her deposition where she responded that a possible accommodation would have been to avoid heavy lifting and/or request assistance in situations where heavy lifting was required. Guneratne was never able to make these requests for accommodations prior to her deposition which was taken as a result of her filing charges of discrimination. This question and her subsequent answers were after the fact. Guneratne had been previously foreclosed from making any requests for accommodations. She was told that because she could not

perform the essential functions of the job, she could not work. Therefore, she had no evidence to present in order to meet her burden of proof establishing that reasonable accommodations would have allowed her to meet the requirements of the job.

The burden of proving a prima facie case is that of the plaintiff, but ADA guidelines state that the evaluation of reasonable accommodations is an interactive process. An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations . . . 42 U.S.C. § 12112(b)(5)(A)." *Beck v. University of Wisconsin-Milwaukee*, 75 F.3d 1130, 1134 (7th Cir. 1996)

"By the statutory language, 'reasonable accommodation' is limited by the employer's knowledge of the disability. (Citation omitted) Whether it is also limited by the employer's knowledge of reasonable accommodation is a trickier question. An 'accommodation' within the meaning of the ADA is not some vague, ill-defined remedy. The ADA defines 'reasonable accommodation' as 'job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodation for individuals with disabilities.' 42 U.S.C. § 12111(9). "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.' citing *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543." *Id.* at 1135.

"The employer has at least some responsibility in determining the necessary accommodation. The federal regulations implementing the ADA state:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) (1995).

> The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.

29 C.F.R. Pt. 1630, App.; see also *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677 (1st Cir. 1995). *Id.*"

The District of Columbia Circuit has held that it is the employer "which bears the burden of making a 'reasonable effort' to determine which accommodation would be most appropriate once a disabled employee has requested an accommodation, 29 C.F.R. Pt. 1630, App. 1630.9 . . . " *AKA v. Washington Hospital Center*, 116 F.3d 876, 891 (D.C. Cir. 1997).

It is interesting to note that a district court in the Seventh Circuit has recently held that an employer did not show that "there was no other vacant position to which [employee] could have been reassigned in order to

accommodate his disability. *Citing* 42 U.S.C. § 122111(9)(B)" *Hammer v. Bd. of Education of Arlington Heights School Dist., No. 25*, 955 F.Supp. 921, 926 (N.D. Ill. 1997) It would appear several courts have held the employer liable for proving that reasonable accommodations were not possible.

In 1980, the Fifth Circuit, *Prewitt v. United States Postal Service*, 662 F.2d 292, 306 (5th Cir. 1980), stated that "under section 504 of the Rehabilitation Act, 'the burden of persuasion in proving inability to accommodate always remains on the employer' with the stipulation that once the employer comes forward with the evidence that the employer can not reasonably accommodate, the employee must present rebuttal evidence. To sustain a prima facie case, there should . . . be a facial showing or at least plausible reasons to believe that the handicap can be accommodated. Such a showing would require, at a minimium, that an employee present herself to the employer as someone willing and able to work, but for a surmountable handicap." *Id.* at 309-10. In 1993, the Fifth Circuit held that the employee had the burden of proof of otherwise qualified which includes reasonable accommodation under the ADA. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).

Clearly, whether the ultimate burden of proof is upon the employer or the employee, determination of reasonable accommodations requires the interaction between the employer and employee. A 100% recovery policy would by definition foreclose such communication with the employer. Yet, as in the case at bar, when the Plaintiff carries the burden of proof, it appears that the Plaintiff has failed to establish a prima facie case of discrimination

by failing to show that he or she can perform the essential functions of the job with reasonable accommodations.

In the case at bar, the district court made the determination that an accommodation of avoiding and/or seeking assistance with heavy lifting could pose a risk to the health and welfare of St. Mary's patients. (App. p. 9) Again, based on the foreclosure of individual evaluation due to the 100% recovery policy, this assessment was premature.

Under 42 U.S.C. § 12113(b), the term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. The term "direct threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). A slightly increased risk is not enough, however; a "high probability" of substantial harm is required. See Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r). A speculative or remote risk is insufficient. *Id.*

The determination that Guneratne posed a safety risk to herself or others was rendered without the requisite individual assessment. Furthermore, the issue of safety is an affirmative defense; therefore, the burden rests with the employer to provide evidence of such evaluation.

Relatively, few courts have discussed per se violations of the ADA as the result of a defendant's policies or procedures. The following cases involve Title II of the ADA, which pertains to public entities or public services, rather than Title I, which pertains to employment. See,

e.g., *Stillwell v. Kansas City, Mo., Bd. of Police Comm'rs*, 872 F.Supp. 682, 686-88 (W.D.Mo. 1995) (Under Title II, the public entity provision of the ADA, 42 U.S.C. §§ 12131-12165, a blanket exclusion of one-handed applicants from licensing as police officers was a per se violation); *Coleman v. Zatechka*, 824 F.Supp. 1360, 1367-69 (D.Neb. 1993) (Title II of ADA "prohibits using assumption of [disqualification because of disability] rather than facts and conclusions gleaned from individualized inquiry," citing 28 C.F.R. Pt. 35, App. A at 349, and such an assumption "falls far short of the individualized assessment that is required by the ADA"); *Galloway v. Superior Court of Dist. Of Columbia*, 816 F.Supp. 12, 18-19 (D.D.C. 1993) (Title II of the ADA prohibited assumption that blind persons could not serve on juries, because, with or without reasonable accommodation, blind persons could serve on juries in a number of cases, thus "categorical exclusion of all blind persons from Superior Court juries violates the ADA"); *Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 345 (D.Ariz. 1992) (Title III, regarding public accommodations, requires individualized inquiry, and prohibits blanket exclusions, such as the one in question which "amount[ed] to a[n] absolute ban on coaches in wheelchairs in the coachers [sic] box, regardless of the coach's disability or the field or game conditions involved. Regrettably, such a policy-implemented without public discourse – falls markedly short of the requirements enunciated in the Americans with Disabilities Act and its implementing regulations.)" *Hutchison v. United Parcel Svc., Inc.*, 883 F.Supp. 379, 396-97 (N.D.Iowa 1995)

Several district courts have addressed the issue of 100% recovery or blanket exclusion policies in the context of private employment under Title I of the ADA. In *EEOC v. Chrysler Corp.*, 917 F.Supp. 1164, 1172-73 (E.D. Mich. 1996), it was determined that Chrysler's policy of not authorizing employment for an individual with a blood sugar level of greater than 140 mg/dl is a blanket exclusion violative of the ADA. The same court provided the following evaluation of cases which held that blanket exclusions were a violation of the ADA, to-wit:

> *Stillwell v. City, Mo. Bd. of Police Commissioners*, 872 F.Supp. 682 (W.D. Mo.1995) (holding that an across-the-board exclusion of persons with one hand as armed security guards violates the ADA) and *Bombrys v. City of Toledo*, 849 F.Supp. 1210 (N.D. Ohio 1993) (finding that a rule prohibiting persons with insulin-dependent diabetes from employment as police officers is a blanket exclusion violative of the ADA). [The ADA requires] a case-by-case analysis of disabled individuals 'to accurately determine what risks, if any, they pose to themselves or the public.' *Stillwell*, 872 F.Supp. at 687 (emphasis included). "An individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." *Bombrys*, 849 F.Supp. at 1219. Both courts also stress that blanket exclusions "are to be given the utmost scrutiny," *Bombrys*, 849 F.Supp. at 1219-1220, and are "highly suspect." *Stillwell*, 872 F.Supp. at 686. Moreover, blanket exclusions were found to be "inconsistent with the ideals of the Due Process Clause of the Fourteenth Amendment." *Bombrys*, 849 F.Supp. at 1221.

The District Court for the Western District of Iowa stated, albeit as dicta, that it believed that a 100% healed policy, if it existed, would have been a per se violation of the ADA. *Hutchinson v. United Parcel Svc., Inc.*, 883 F.Supp. 379, 396 (N.D. Iowa 1995). That court held that the employee in that case was not subject to the 100% healed policy in that a reasonable accommodation was offered and rejected. *Id.* at 397.

In the instant case, the 100% recovery requirement acted as a prophylactic preventing access to pursuit of reasonable accommodations and ultimately preventing Guneratne from meeting her burden of proving her prima facie case. The district court and appellate court were silent on this issue. This Court should grant Petitioner consideration of this issue in order to guide lower federal courts to prevent further discrimination.

## CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-41227
Summary Calendar

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BARBARA GUNERATNE,

Plaintiff-Appellant,

versus

ST. MARY'S HOSPITAL,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. G-95-CV-676

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(Filed Jun. 18, 1997)

Before WISDOM, KING, and SMITH, Circuit Judges.

PER CURIAM:*

Barbara Guneratne filed this action against St. Mary's Hospital alleging that the hospital unlawfully discriminated against her in violation of Title VII of the Civil Act of 1964, 42 U.S.C. §§ 12101-12117, and 12201-12213 (also known as the Americans with Disability Act), and in violation of the Rehabilitation Act of 1973. Guneratne also

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

asserted a claim for retaliation in violation of the Texas Worker's Compensation Act. The district court granted summary judgment in St. Mary's favor and dismissed all claims. Guneratne appeals.

Guneratne contends that district court erred in finding that she was unable to perform the essential functions of a clinical nurse and that the hospital could not make a reasonable accommodation for her. We have reviewed the record de novo and agree with the district court's analysis. Accordingly, we AFFIRM for the reasons stated by the district court. *See Guneratne v. St. Mary's Hospital*, No. G-95-676 (S.D. Tex. Nov. 1, 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

| | | |
|---|---|---|
| BARBARA GUNERATNE | § | |
| | § | CIVIL ACTION |
| VS. | § | NO. G-95-676 |
| | § | |
| ST. MARY'S HOSPITAL | § | (Filed Nov. 1, 1996) |
| | § | |
| | § | |

**ORDER GRANTING SUMMARY JUDGMENT**

In this action, Plaintiff Barbara Guneratne claims that she was subject to unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 12101-12117 and 12201-12213 (also known as the Americans with Disabilities Act of 1990, the "ADA") and in violation of the Rehabilitation Act of 1973. Plaintiff also claims that she was subject to retaliation in violation of the Texas Worker's Compensation Act for filing a worker's compensation claim. Plaintiff seeks to recover compensatory and punitive damages. Now before the Court is the Defendants' Motion for Summary Judgment, dated September 27, 1996, and Plaintiff's Motion for Summary Judgment, dated October 10, 1996. For the reasons set forth below, the Defendant's Motion for Summary Judgment is hereby **GRANTED,** and the Plaintiff's Motion for Summary Judgment is hereby **DENIED**.

## I. FACTUAL BACKGROUND

Plaintiff is a registered nurse who began working for St. Mary's Hospital in 1989. She held several different

positions during her tenure at the hospital. While working as a clinical relief nurse, on August 15, 1993, Plaintiff claims that she injured her back while attempting to lift a patient.

Plaintiff sought medical treatment for her injuries and did not attempt to return to work at the hospital until June, 1994. At that time Plaintiff submitted to St. Mary's a release with restrictions from her physician, Dr. J. Pat Kearney. In that release, Dr. Kearney specified that Guneratne's activity was restricted to "no lifting or bending greater than 5 lbs." Defendant's Ex. A, p.103, lines 20-23. A second release by Dr. Kearney, submitted on July 27, 1994, stated that Guneratne should "avoid heavy lifting." Defendant's Ex. A, p.120, lines 11-23. Plaintiff did not return to work at St. Mary's following her alleged injury. Nor did she submit any other releases to the hospital other than the two obtained from Dr. Kearney.

Plaintiff was advised by the hospital that its Return to Work Policy required that she present a physician's release to full duties with no restrictions. To determine whether a release was sufficient to enable an employee to return to work, the Policy further required that any restrictions noted on the release had to be measured against the ADA physical requirements for the employee's job. That is, Plaintiff had to be able to perform the essential functions of her job as a clinical relief nurse with or without accommodation in order to return to work.

The ADA physical requirements for the job of a clinical nurse included the activity of lifting or carrying weight up to 40 lbs. 61-100% of the time, and over 40 lbs.

31-60% of the time. For example, nurses at St. Mary's were often required to lift and/or move patients in order to "turn" patients, assist them to walk, lift patients in and out of wheelchairs, help them to bathe, etc., or to lift and/or move weighty equipment or furniture to assist in patient comfort. Many of these demanding lifting tasks are necessary in emergency situations in which the nurse must react quickly.

St. Mary's argues that because the two releases submitted by Dr. Kearney did not allow Plaintiff to engage in this essential function of lifting, Plaintiff was not able to return to work. Plaintiff argues, on the other hand, that St. Mary's had a policy of not allowing any employee who has an injury or disability to return to work unless there had been a 100% release, which is a per se violation of the ADA.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56. Rule 56(e) requires that when a motion for summary judgment is made, the nonmoving party must set forth set forth specific facts showing that there is a genuine issue for trial. *Id.; See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary

judgment. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2510. If the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *Id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

## III. THE ADA CLAIMS[1]

To establish a *prima facie* case of employment discrimination under the ADA, the Plaintiff must show that she:

> (1) was "disabled" as that term is defined by the ADA,
>
> (2) is qualified, with or without accommodation, for the position sought,
>
> (3) was subject to adverse employment action, and
>
> (4) was replaced by a non-disabled person or was treated less favorably than non-disabled employees.

*E.E.O.C. v. Texas Bus Lines*, 923 F.Supp. 965, 969 (S.D.Tex. 1996), *citing Norris v. Hartmax Specialty Stores, Inc.*, 913 F.2d 253, 254 (5th Cir. 1990); *EEOC v. Brown & Root, Inc.*, 688 F.2d 338, 340-41 (5th Cir. 1982).

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[1] Plaintiff's claims under the Rehabilitation Act are subject to the same standards as her ADA claims. *See* Rehabilitation Act Amendments of 1992, Public Law No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. § 794(d)) ("the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990").

Assuming, *arguendo,* that Guneratne is able to establish that she has a "disability" as defined by the ADA,[2] she cannot establish a *prima facie* case of discrimination under the ADA because she cannot show that she is a "qualified individual." In determining whether a plaintiff is a "qualified individual" with a disability, the Court must first determine whether the plaintiff can perform the essential functions of the job she holds. *Chandler v. City of Dallas,* 2 F.3d 1385, 1393 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 1386 (1994); *see also Daugherty v. City of El Paso,* 56 F.3d 695, 696 (5th Cir. 1995), *cert. denied,* 116 S.Ct. 1263 (1996). If the Court concludes that the plaintiff is not able to perform the essential functions of the job, the Court must then determine whether any reasonable accommodation by the employer would enable the plaintiff to perform those functions. *Chandler,* 2 F.3d at 1394-94. If no reasonable accommodation would enable the plaintiff to perform the essential functions of her position, then she is not a "qualified individual" with a disability and is not subject to the protection afforded by the ADA. *Tyndall v. National Education Centers, Inc.,* 31 F.3d 209, 212-13 (4th Cir. 1994).

"Essential functions" are those functions that bear more than a marginal relationship to the job at issue. *Chandler,* 2 F.3d at 1393. Physical criteria, such as the ability to lift heavy loads, must be necessary and substantially related to a person's ability to perform the essential

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[2] Pursuant to the ADA, an individual is considered to have a disability if that individual either has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," or has "a record of such impairment," or is "regarded as having such an impairment." 42 U.S.C. § 12102(2).

functions of the job. Evidence of whether a particular function is essential includes, but is not limited to: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience or past incumbents on the job; and/or (7) the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3) (1995).

The Court concludes that the Plaintiff in this case is unable to perform the essential functions of her job as a clinical nurse at St. Mary's Hospital. The hospital had a written job description for the job of Clinical Nurse, in which the category "Working Conditions and Physical Requirements" referred the reader to the "ADA Survey of Physical Requirements" for the job of Clinical employer would enable the Plaintiff to perform those essential functions. *Chandler,* 2 F.3d at 1393-94. However, the ADA does not require an employer to eliminate or reallocate essential functions of a position in order to provide accommodation. *Bradley v. University of Texas M.D. Anderson Cancer Center,* 3 F.3d 922, 925 (5th Cir. 1993), *cert. denied,* 510 U.S. 1119, 114 S.Ct. 1071 (1994); *see also* 29 C.F.R. § 1630.2(o) (1995). "Such redefinition exceeds reasonable accommodation." *Bradley,* 3 F.3d at 925.

The Plaintiff has suggested that, as an accommodation, she should have been allowed to avoid heavy lifting and/or permitted to request assistance in situations where heavy lifting was required. Such an accommodation would eliminate or reallocate an essential function of

Guneratne's job, which the ADA does not require. *Bradley,* 3 F.3d at 925. Additionally, such an accommodation could pose a risk to the health and welfare of St. Mary's patients in the event of an emergency situation which would require immediate action. *Daugherty,* 56 F.3d at 698 (holding that an individual is not qualified for a job if there is a genuine substantial risk that she could be injured or could injure others and the employer cannot modify the job to eliminate that risk); *see also* 29 C.F.R. § 1630.2(r).

Therefore, the Court concludes that Guneratne cannot perform the physical duties of nursing care which are an essential function of the position of a clinical nurse. There is no accommodation Nurse. The ADA Survey of Physical Requirements for the job of Clinical Nurse required, among other things, that the nurse be physically able to lift or carry weight up to 40 lbs 61-100% of the time, and over 40 lbs. 31-60% of the time. These physical requirements are an essential function of the job because nurses must be prepared to immediately react in emergency situations, which Plaintiff herself suggests occur "possibly once a week or once every four or five days" on the unit where she worked. *See* Defendant's Ex. A, p.82, lines 14-19. Furthermore, nurses are also involved in physically demanding lifting tasks including turning patients, helping them walk, lifting patients in and out of wheelchairs, and helping them bathe. Guneratne *herself* admits that only thirty to forty-five minutes of an average eight to twelve hour shift are spent doing something other than physical activity. *See* Defendant's Ex. A., p.82, lines 1-13. Thus, the Plaintiff's own description of the job of clinical nurse makes it clear to this Court

that physically demanding duties are an essential function of that position. Although these tasks may not be essential to the work performed by a trained registered nurse, the summary judgment record is clear that these tasks were performed by the clinical nurses at St. Mary's and were an integral part of patient care.

As the Court has concluded that the Plaintiff is unable to perform the essential functions of her job, the Court now turns to the question of whether any reasonable accommodation by the that St. Mary's Hospital could have made that would enable her to perform those duties. As Plaintiff has failed to state a *prima facie* case pursuant to the ADA, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED** as to the ADA and Rehabilitation Act claims. Accordingly, Plaintiff's ADA and Rehabilitation Act claims are **DISMISSED WITH PREJUDICE.**

## IV. THE WORKER'S COMPENSATION RETALIATION CLAIMS

The Texas Labor Code provides that a person may not discharge or in any other manner discriminate against an employee because the employee has in good faith filed a worker's compensation claim. TEX. LAB. CODE ANN. § 451.001 (Vernon Supp. 1995). To establish a claim under this statute, the plaintiff has the burden of establishing a causal nexus between her filing of a worker's compensation claim and any adverse action by her employer. *Parham v. Carrier Corporation*, 9 F.3d 383, 386 (5th Cir. 1993). "The plaintiff need not prove that his quest for worker's

compensation was the sole reason for [any adverse action], but he must establish that it was a determining factor." *Id.*

The Plaintiff has failed to show a causal nexus between her filing of a worker's compensation claim and the hospital's decision to not allow her to return to work. Guneratne has offered no evidence to substantiate her claim that her filing of a worker's compensation claim was a factor, let alone a determining factor with respect to any of the hospital's actions. In fact, the Court has already concluded that the overwhelming evidence supports the fact that the Plaintiff was not able to return to work because she was physically unable to perform the essential functions of her job. *See Parham*, 9 F.3d at 388-89 (finding that plaintiff had failed to establish a causal nexus where the objective evidence showed that the reason the plaintiff did to return to work was that he was not physically able to perform his job). Therefore, the Court **GRANTS** Defendant's Motion for Summary Judgment as to the Texas Workers' Compensation Act retaliatory discharge claims,[3] and those claims are hereby **DISMISSED WITH PREJUDICE.**

## V. CONCLUSION

For the reasons stated above, this Court **GRANTS** the Defendant's Motion for Summary Judgment as to all

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[3] Plaintiff's Motion for Summary Judgment is silent as to the Texas Workers' Compensation Act retaliatory discharge claims; however, to the extent that Plaintiff has made a Motion for Summary Judgment as to those claims, that Motion is hereby **DENIED.**

claims, and **DENIES** the Plaintiff's Motion for Summary Judgment as to all claims. Furthermore, Defendant's request for costs to be assessed against the Plaintiff is hereby **DENIED**. All parties are to bear their own costs incurred herein to date.

IT IS SO ORDERED.

DONE this 31st day of October, 1996, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

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|---|---|---|
| BARBARA GUNERATNE | § | |
| | § | CIVIL ACTION |
| VS. | § | NO. G-95-676 |
| | § | |
| ST. MARY'S HOSPITAL | § | |

**FINAL JUDGMENT**

(Filed Nov. 01, 1996)

For the reasons set forth in the Order issued this date, Defendants' Motion for Summary Judgment is **GRANTED** with respect to all of the Plaintiff's claims and all such claims are hereby **DISMISSED WITH PREJUDICE**. Furthermore, the Plaintiff's Motion for Summary Judgment is **DENIED** as to all claims. All parties are to bear their own costs incurred herein to date.

**THIS IS A FINAL JUDGMENT.**

**IT IS SO ORDERED.**

**DONE** this 31st day of October, 1996, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

## § 12101. Findings and purpose

### (a) Findings

The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements; such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

**(b) Purpose**

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328.)

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**§ 12102. Definitions**

As used in this chapter:

**(1) Auxiliary aids and services**

The term "auxiliary aids and services" includes –

**(A)** qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

**(B)** qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

**(C)** acquisition or modification of equipment or devices; and

**(D)** other similar services and actions.

**(2) Disability**

The term "disability" means, with respect to an individual –

**(A)** a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

**(B)** a record of such an impairment; or

**(C)** being regarded as having such an impairment.

**(3) State**

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

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**§ 12111. Definitions**

As used in this subchapter:

**(1) Commission**

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000E-4 of this title.

**(2) Covered entity**

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

**(3) Direct threat**

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

**(4) Employee**

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

**(5) Employer**

**(A) In general**

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

**(B) Exceptions**

The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

**(6) Illegal use of drugs**

**(A) In general**

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.

**(B) Drugs**

the term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

**(7) Person, etc.**

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

**(8) Qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

**(9) Reasonable accommodation**

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

**(10) Undue hardship**

**(A) In general**

The term "undue hardship" means an action requiring significant difficulty or expenses, when considered in light of the factors set forth in subparagraph (B).

**(B) Factors to be considered**

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166. Title I, § 109(a), Nov. 21, 1991, 106 Stat. 1077.)

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**§ 12112. Discrimination**

**(a) General rule**

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

**(b) Construction**

As used in subsection (a) of this section, the term "discriminate" includes –

**(1)** limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

**(2)** participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

**(3)** utilizing standards, criteria, or methods of administration –

**(A)** that have the effect of discrimination on the basis of disability; or

**(B)** that perpetuate the discrimination of others who are subject to common administrative control;

**(4)** excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

**(5)(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

**(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

**(c) Covered entities in foreign countries**

**(1) In general**

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

**(2) Control of corporation**

**(A) Presumption**

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under

this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

**(B) Exception**

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

**(C) Determination**

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

**(i)** the interrelation of operations;

**(ii)** the common management;

**(iii)** the centralized control of labor relations; and

**(iv)** the common ownership or financial control, of the employer and the corporation.

**(d) Medical examinations and inquiries**

**(1) In general**

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examination and inquiries.

**(2) Preemployment**

**(A) Prohibited examination on inquiry**

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a

disability or as to the nature or severity of such disability.

**(B) Acceptable inquiry**

A covered entity may make preemployment inquires into the ability of an applicant to perform job-related functions.

**(3) Employment entrance examination**

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

**(A)** all entering employees are subjected to such an examination regardless of disability;

**(B)** information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

**(i)** supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

**(ii)** first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

**(iii)** government officials investigating compliance with this chapter shall be provided relevant information on request; and

**(C)** the results of such examination are used only in accordance with this subchapter.

**(4) Examination and inquiry**

**(A) Prohibited examinations and inquiries**

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

**(B) Acceptable examinations and inquiries**

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

**(C) Requirement**

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

### § 12113. Defenses

#### (a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

#### (b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

#### (c) Religious entities

##### (1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

##### (2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

**(d) List of infectious and communicable diseases**

**(1) In general**

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall –

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

**(2) Applications**

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

**(3) Construction**

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food

handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

(Pub.L. 101-336, Title I, § 103, July 26, 1990, 104 Stat. 333.)

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**§ 12114. Illegal use of drugs and alcohol**

**(a) Qualified individual with a disability**

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

**(b) Rules of construction**

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

**(c) Authority of covered entity**

A covered entity –

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and illegal use of drugs, require that –

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered

entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

**(d) Drug testing**

**(1) In general**

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

**(2) Construction**

Nothing in this subchapter shall be construed to encourage, prohibit or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

**(e) Transportation employees**

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to –

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

Pub.L. 101-336, Title I, § 104, July 26, 1990, 104 Stat. 334.)

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**§ 12115. Posting notices**

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the

applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

(Pub.L. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336.)

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**§ 12116. Regulations**

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

(Pub.L. 101-336, Title I, § 106, July 26, 1990, 104 Stat. 336.)

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**§ 12117. Enforcement**

**(a) Powers, remedies, and procedures**

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

**(b) Coordination**

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaint filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub.L. 101-336, Title I, § 107, July 26, 1990, 104 Stat. 336.)

Supreme Court, U.S.
FILED
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No. 97-528

In The

# Supreme Court of the United States

October Term, 1997

BARBARA GUNERATNE,

*Petitioner,*

v.

ST. MARY'S HOSPITAL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent believes that Petitioner has misstated the question presented for review and, thus, Respondent rephrases the question presented as follows:

> Whether Respondent's return-to-work policy was a *per se* violation of the Americans with Disabilities Act?

## PARTIES TO THE PROCEEDINGS

1. Barbara Guneratne, Plaintiff and Appellant below and Petitioner for certiorari before this Honorable Court;

2. St. Mary's Hospital, Defendant and Appellee below and Respondent before this Honorable Court.

The following is the parent company of respondent St. Mary's: Sisters of Charity of the Incarnate Word. There are no non-wholly-owned subsidiaries of respondent St. Mary's Hospital.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF FACTS ..... 1

REASONS WHY THE PETITION SHOULD BE DENIED ..... 4

A. Reasonable Accommodation and the ADA ... 6

B. Reasonable Accommodation and the Petitioner's Burden ..... 9

C. The Policy: Medical Release or 100% Recovery? ..... 11

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

Page

### CASES

*Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) ..... 9

*Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) ..... 7, 8

*Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) ..... 9, 11

*Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991) ..... 7

*Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996) ..... 10

*Emrick v. Libbey-Owens-Ford Co.*, 875 F. Supp. 393 (E.D. Tex. 1995) ..... 8

*Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771 (S.D. Tex. 1996), *aff'd*, 119 F.3d 3 (5th Cir. 1997) ... 1, 6

*Hammer v. Board of Educ. of Arlington Heights*, 955 F. Supp. 921 (N.D. Ill. 1997) ..... 7, 11

*Leatherwood v. Houston Post Co.*, 59 F.3d 533 (5th Cir. 1995) ..... 10

*Rogers v. International Marine Terminals*, 87 F.3d 755 (5th Cir. 1996) ..... 10

*School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987) ..... 6

*Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir.), *cert. denied*, 117 S. Ct. 586 (1996) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Tyndall v. National Education Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994) ..... 11

*Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997) ..... 9

*Zevator v. Methodist Hosp. of Houston, Texas*, 1995 WL 500637 (S.D. Tex. Mar. 30, 1995) .....7, 8

STATUTES

29 C.F.R. § 1630.2(r) ..... 11

42 U.S.C. § 12111(9) ..... 7

42 U.S.C. § 12115(b)(5)(a) ..... 6

Rehabilitation Act Amendments of 1992, Public Law No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. § 749(d)). ..... 5

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, St. Mary's Hospital, respectfully requests that this Court deny the petition for writ of certiorari to review the unpublished decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 18, 1997. That opinion upheld the district court's entry of summary judgment on behalf of St. Mary's Hospital in *Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771 (S.D. Tex. 1996), *aff'd*, 119 F.3d 3 (5th Cir. 1997) (Table).

## STATEMENT OF FACTS

Petitioner, a registered nurse, began working for St. Mary's Hospital in 1989. She held several different jobs with the hospital until July 21, 1993, when she requested a transfer to the position of clinical relief nurse. On August 15, 1993, after approximately three (3) days on the job as a clinical relief nurse, petitioner claimed that she had injured her back while attempting to lift a patient.

Petitioner sought medical care in connection with her alleged injury, but did not attempt to return to work until on or about June 8, 1994, almost one (1) year later, when she submitted a release to St. Mary's with restrictions from her physician, Dr. J. Pat Kearney. Pursuant to Dr. Kearney's release, her activity was to be limited to "no lifting or bending greater than 5 [pounds]." On July 27, 1994, petitioner submitted a second release with restrictions from Dr. Kearney which stated, "avoid heavy lifting." Petitioner was advised by St. Mary's that its return-to-work policy required that she present "a physician's

release to full duties with no restrictions" before she could return to work. St. Mary's policy states:

> Employees having been off work five days or more due to illness, injury, or medical reasons are required to present a physician's release to return to work without restrictions, to the employee health nurse or designee prior to returning to work.

Petitioner's complaint alleged that this policy is an illegal "100% recovery" policy. Two hospital employees provided testimony before the district court in support of respondent's motion for summary judgment, clearly stating that St. Mary's policy is not a "100% recovery" policy.

Petitioner quoted from the testimony of Maria Theresa Mendez, Manager of Human Resources, without giving this Court the proper context. Mendez's testimony, taken in its proper context, explained the following:

> Q: Then Barbara Guneratne could have come back to work at any point in time if she had just simply told y'all that she was ready to come back to work?
>
> A: If she had a full release of her – of her job duties that she could perform, yes, sir, she could have returned to work.
>
> Q: And we talked about that a little bit this morning. You were not here. But what is your understanding of this full release? What – what is the employee required to produce?
>
> A: Their full release of their – pertaining to their job. They have the ADA behind their job description that would tell them how

> much they could lift and the things they could actually do. So, it's pertaining to your job.

This testimony was further supported by Mendez's superior, James Fitch, the Director of Human Resources, who explained:

> Q: Okay. Under 2, it says, "Employees having been off from work five days or more due to illness, injury or medical reasons are required to present a physician's release to return to work without restrictions to the employee health nurse or designee prior to returning to work." It has the language "to work without restrictions." What does that mean?
>
> A: I answered that before; but my interpretation of that is in terms of restrictions relating to the essential elements and physical responsibilities, requirements of the job. That's – that's what that means.

In summary, St. Mary's assessed the employee's ability to perform the essential functions of her position based on a comparison between the restrictions noted on the release and the ADA requirements for the job at issue. In other words, petitioner had to be able to perform the essential functions of her position as a clinical nurse, with or without accommodation, before she could return to work. Therefore, she could have returned to work once she presented a full release indicating that she could perform the essential physical duties of her job, as described on the ADA survey; petitioner never presented such a release.

The ADA physical requirements for the job of a clinical nurse were part of the job description for clinical nurse, and petitioner was aware of the job description. The ADA physical requirements included the activity of lifting or carrying weight up to 40 lbs. 61-100% of the time, and over 40 lbs. 31-60% of the time. For example, nurses at St. Mary's were often required to lift and/or move patients or to lift and/or move weighty equipment or furniture, such as patient monitoring machines, scales or reclining chairs or beds to assist with patient comfort. Petitioner's supervisor, Joyce Pickney, wrote a letter to petitioner on September 1, 1994, which set forth the physical requirements of the job. Petitioner complains because the letter stated that St. Mary's does not have light duty positions and, therefore, petitioner had to have a full release to return to work. Petitioner did not return to work following her alleged injury, because the two releases did not allow her to engage in the essential function of lifting. She never submitted any releases to St. Mary's other than the two (2) which she obtained from Dr. Kearney stating her inability to lift.

## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner claims that her question is an important one for this Court tc decide, because there is no clear precedent in the lower courts; however, the lower courts correctly interpreted the statute so there is nothing for this Court to clarify. In reaching its decision, the Fifth Circuit relied on the well-reasoned opinion of the district court. The district court found that petitioner was unable to perform the essential

functions of her job, and the only accommodation that could be made was for St. Mary's to eliminate or reallocate lifting, an essential function of her job. The Americans with Disabilities Act ("ADA") does not require such elimination or reallocation of essential functions. Also, reasoning does not support a finding that St. Mary's had a 100% recovery policy. The district court concluded, and the appellate court affirmed, that petitioner had failed to state a *prima facie* case pursuant to the ADA. Neither the decisions below nor the record supports an affirmative finding by this Court to the question presented in the petition. The decisions below correctly applied the law, and petitioner does not allege a conflict among the circuits.

The sole question presented by *Petitioner Guneratne* in her petition for writ of certiorari (page i) is: Is a policy which requires all persons to have documentation of 100% recovery, no limitations, before returning to work a violation of the Americans with Disabilities Act?[1] The Fifth Circuit, however, did not decide that question. Moreover, this Court cannot decide the question presented by the petitioner based on the record. The only question that this Court can address is whether the St. Mary's return-to-work policy, requiring the employee to

---

[1] Petitioner's claims under the Rehabilitation Act are subject to the same standards as her ADA claims. *See* Rehabilitation Act Amendments of 1992, Public Law No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. § 749(d)) ("the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990").

be able to perform the essential functions of the job, is a *per se* violation of the Americans with Disabilities Act ("ADA"). The Fifth Circuit adopted the district court's analysis, *Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771 (S.D. Tex. 1996), which addressed the following issue: whether petitioner was a qualified individual – one who is able to perform the essential functions of a clinical nurse – and, if not, whether the hospital could make a reasonable accommodation for her. *Id.* at 774. The district court found that physically demanding duties, specifically lifting, are essential functions of a clinical nurse. *Id.*

In her petition for writ of certiorari, petitioner does not complain that the district court erred in finding that she was not a qualified individual. Given this Court's analysis of otherwise qualified individual summarized in *School Board of Nassau County, Florida v. Arline* 480 U.S. 273, 287 n.17 (1987), petitioner must agree with the district court that she was not a qualified individual. Moreover, petitioner has not seriously contested that lifting is an essential function of a clinical nurse. Instead she faults the district court's analysis and conclusion that there is no accommodation that would permit her to perform the essential functions.

### A. Reasonable Accommodation and the ADA

The ADA provides that reasonable accommodation is required when the limitation is known or obvious to the employer; the individual is otherwise qualified and has a disability; and the accommodation will not impose an undue hardship on the employer. 42 U.S.C.

§ 12115(b)(5)(a). Reasonable accommodation is very broad, and includes such things as job restructuring to remove non-essential job functions, modified work schedules, and medication. *See* 42 U.S.C. § 12111(9); *Chiari v. City of League City*, 920 F.2d 311, 317-18 (5th Cir. 1991).

St. Mary's return-to-work policy required petitioner to present "a physician's release to full duties with no restrictions" before she could return to work. To determine whether the release was sufficient to enable her to return to work, any restrictions noted on the release had to be measured against the ADA physical requirements for her job. Therefore, before she could return to work, petitioner had to be able to perform the essential functions of her job, with or without accommodation, according to the ADA criteria. St. Mary's was not seeking a statement that petitioner had recovered 100%; rather, it was simply seeking a full medical release from petitioner's doctor that would allow her to perform the essential functions of her job.

Petitioner has continually misconstrued this requirement as a *per se* violation of the ADA. Courts have defined a *per se* violation as one in which an individual assessment of an individual's ability to perform the essential functions of the person's job with or without accommodation is not made by the employer. *See, e.g., Hammer v. Board of Educ. of Arlington Heights*, 955 F. Supp. 921, 927 (N.D. Ill. 1997). The ADA, however, does not require an employer to eliminate or reallocate essential functions of a position in order to provide accommodation. *Zevator v. Methodist Hosp. of Houston, Texas*, 1995 WL 500637 (S.D. Tex. Mar. 30, 1995); *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th

Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Emrick v. Libbey-Owens-Ford Co.*, 875 F.Supp 393, 398 (E.D. Tex 1995). "Such redefinition exceeds reasonable accommodation." *Bradley* 3 F.3d at 925.

In *Zevator v. Methodist Hospital of Houston, Texas*, 1995 WL 500637 (S.D. Tex. Mar. 30, 1995), the plaintiff, a staff nurse in the psychiatry department of Methodist Hospital, was involved in a series of automobile accidents. *Id.* As a result of injuries which she sustained in these accidents, the plaintiff returned to work with restrictions on standing and lifting. *Id.* The plaintiff requested relief from some of the physical aspects of patient care, including turning patients, helping them walk, and various acts of lifting. *Id.* The plaintiff felt that these were merely "marginal aspects" of her job which could be reassigned to other staff nurses. *Id.* The district judge, however, disagreed and found that these physical requirements were essential functions of a nurse's job which were not required to be reassigned pursuant to the ADA. *Id.* Similar to the requirements in *Zevator*, petitioner's inability to lift "more than 5 lbs." or any "heavy objects," rendered her unable to perform essential functions of her job as a clinical nurse. Therefore, St. Mary's return-to-work policy, which is based on safety and health considerations and not complete recovery, is not a *per se* violation of the ADA. Petitioner was simply not a qualified individual: she could not perform the essential functions of the job of clinical nurse at St. Mary's Hospital.

**B. Reasonable Accommodation and the Petitioner's Burden**

Petitioner cites a portion of a case from the Court of Appeals for the Seventh Circuit that states: "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (citation omitted). This opinion also states that the ADA and the implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. *Id.* at 1137. In that case, the employee, unlike petitioner, made specific requests for accommodation. *See id.* at 1136. Furthermore, the burden is on the employee to demonstrate that she is otherwise qualified through a two-step inquiry: first, she must be able to perform the essential functions of the job; and second, if she is unable to perform the essential functions, she must establish whether a reasonable accommodation by the employer would enable her to perform those functions. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). Even if the parties engage in an interactive process, the ultimate burden remains on the employee to produce evidence that reasonable accommodations were available. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (11th Cir. 1997).

In this case, petitioner never requested to be accommodated; St. Mary's had a form for making such a request, and petitioner had previously used the form.

Moreover, the Fifth Circuit has held that it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process of determining an accommodation, and, therefore, if the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one. *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir.), *cert. denied*, 117 S.Ct. 586 (1996). Furthermore, petitioner has never demonstrated, and cannot, that St. Mary's could reasonably accommodate her disability. *See Rogers v. International Marine Terminals*, 87 F.3d 755, 759 (5th Cir. 1996) (employee must demonstrate that employer can reasonably accommodate the disability). *See also Leatherwood v. Houston Post Co.*, 59 F.3d 533, 536 n.4 (5th Cir. 1995) (employee did not request accommodation and did not offer evidence of what specific accommodation would have worked other than someone performing his duties).

Not until her deposition did petitioner suggest an accommodation. Then, she suggested that she should have been allowed to avoid heavy lifting and/or permitted to "request assistance" in situations where heavy lifting was required. Such an accommodation would eliminate or reallocate an essential function of Plaintiff's job, which the ADA does not require. Additionally, such an accommodation could have posed a risk to the welfare of St. Mary's patients if an emergency situation had arisen which required immediate action. *See Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (" . . . an individual is not qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure

others, and the employer cannot modify the job to eliminate that risk" (citation omitted)), *cert. denied*, 116 S. Ct. 1263 (1996); *see also* 29 C.F.R. § 1630.2(r). If no reasonable accommodation by the employer would enable the plaintiff to perform the essential functions of the position, then she is not a "qualified individual" with a disability and is not subject to the protection afforded by the ADA. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 213-14 (4th Cir. 1994). The record in this case proves that petitioner did not meet her burden, and the record also supports the lower courts' finding that petitioner was not a qualified individual.

### C. The Policy: Medical Release or 100% Recovery?

Petitioner has continually misstated the requirements of St. Mary's return-to-work policy. The policy requires that a worker be medically released to return to her job – not that she be 100% recovered. St. Mary's request does not fit the definition of a *per se* violation. *See Hammer*, 955 F. Supp. at 927 (*per se* violation occurs where no individual assessment of ability to perform job occurs).

For St. Mary's return-to-work policy to be a *per se* violation, this Court would have to find that the record demonstrated that St. Mary's required petitioner to perform non-essential job duties. To so find, this Court would have to determine that lifting was a marginal job function. *See Chandler*, 2 F.3d at 1393 (essential function is one that bears more than a marginal relationship to job at issue). The lifting function occupied 61-100% of the time; therefore, it is most definitely not a marginal job function.

St. Mary's policy followed the requirements of the ADA by comparing petitioner's restriction to the essential job functions of a clinical nurse. This comparison only ensured that the medical release allowed petitioner to perform the essential functions of her job. Petitioner is attempting to complain that the policy prohibited the interactive process to determine a reasonable accommodation. The only accommodation supported by the record would involve eliminating functions that occupied 61-100% of petitioner's time. The ADA does not require such restructuring; therefore, there is no *per se* violation of the ADA.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: October 24, 1997

Respectfully submitted,

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